

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 9, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2083

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

URBAN A. HUBERT, JR.,

Plaintiff-Appellant,

v.

SYLVIA C. HAMBY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Urban Hubert appeals a judgment dismissing his replevin action against Sylvia Hamby, his former girlfriend and the mother of his child. Hamby, supported by a bill of sale, persuaded the trial court that Hubert gave her his personal property for her to sell and use the proceeds to support their child. Hubert argues that this finding is not supported by the evidence and that the court improperly excluded parol evidence challenging the bill of sale. He also argues that Hamby should have been sanctioned for discovery abuse, the trial court should have allowed Hubert to amend his

pleadings after the trial and that the court's failure to hold a pretrial conference was reversible error. We reject these arguments and affirm the judgment.

The record supports the trial court's finding that Hubert gave Hamby the tools, sporting and camping equipment, stereo and other personal property, without any agreement that Hamby would return the property upon demand. The trial court is the sole arbiter of the witnesses' credibility and this court must accept its findings of fact if any reasonable view of the evidence would support the findings. See *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979). The attorney who drafted the bill of sale and a contemporaneous power of attorney testified that these documents were executed to "facilitate providing for her and possibly [their] child in the event [Hubert was] incarcerated" Hamby stated that the property was given in recognition of Hubert's obligation to support the child and that the property could be liquidated and the proceeds applied to the child support obligation. This testimony, if believed by the trial court, is sufficient to support its finding.

We need not determine whether the trial court properly applied the parol evidence rule when it excluded evidence challenging the bill of sale. The bill of sale stated that the transaction was for valuable consideration. The trial court disallowed testimony tending to establish lack of consideration. This testimony was given, however, in an offer of proof. The trial court stated that its finding that Hubert gave Hamby the property would not have changed had it admitted proffered testimony. Therefore, Hubert has not established any prejudice from the trial court's refusal to admit the proffered testimony into evidence. See § 805.18(2), STATS.

The trial court properly exercised its discretion when it refused to impose sanctions against Hamby for discovery abuse. Excusing a party for not complying with a discovery order constitutes a reasonable exercise of discretion under some circumstances. See *Estate of Glass*, 85 Wis.2d 126, 146, 270 N.W.2d 386, 396 (1978). Here, Hamby appeared without counsel during some of the alleged discovery abuse. A lawsuit by a former boyfriend who is not in prison takes on the appearance of harassment, justifying additional caution by the trial court. Much of the information sought was not central to the trial court's resolution of this case. The court facilitated discovery by other methods rather than imposing a severe sanction such as default judgment. Under these

circumstances, the trial court's refusal to impose discovery sanctions was well within its discretionary authority.

The court properly refused to allow Hubert to amend the pleadings after the trial. Hubert sought to amend the pleadings to allege a breach of contract or unjust enrichment arising out of the finding that Hubert gave Hamby the property as a form of child support. Hamby brought a separate action for child support. Hubert characterizes the second action as a breach of contract and alternatively argues that Hamby was unjustly enriched by receiving both child support and his personal property.¹ A child support obligation is not satisfied by a one-time payment of goods that, after sale, would not support a child for any appreciable time. The record does not support Hubert's assertion that this initial payment was designed to satisfy all future child support responsibilities. In addition, the amount of money that could be generated from selling this property, when compared with the cost of raising a child, cannot be reasonably described as an unjust enrichment. Amending the pleadings to conform with the evidence would have provided Hubert no relief.

Finally, Hubert argues that the trial court erred by refusing to hold a pretrial conference. The only potential prejudice to Hubert from the absence of a pretrial conference involves his failure to timely amend the complaint to allege alternative grounds for relief. Because we conclude Hubert is not entitled to relief even if the grounds had been timely asserted, Hubert was not prejudiced by a lack of a pretrial conference.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

¹ This appeal does not provide a form for challenging any judgment awarding child support.